

ADMINISTRATIVE REGULATION FOR THE VIRGINIA OCCUPATIONAL SAFETY AND HEALTH PROGRAM

16 VAC 25 -60 et seq.

16 VAC 25–60-190 General provisions

- A. Any employer or group of employers desiring a permanent or temporary variance from a standard or regulation pertaining to occupational safety and health may file with the commissioner a written application which shall be subject to the following policies:
1. A request for a variance shall not preclude or stay a citation or bill of complaint for violation of a safety or health standard;
 2. No variances on record keeping requirements required by the U.S. Department of Labor shall be granted by the commissioner;
 3. An employer, or group of employers, who has applied for a variance from the U.S. Department of Labor, and whose application has been denied on its merits, shall not be granted a variance by the commissioner unless there is a showing of changed circumstances significantly affecting the basis upon which the variance was originally denied;
 4. An employer to whom the U.S. Secretary of Labor has granted a variance under OSHA provisions shall document this variance to the commissioner. In such cases, unless compelling local circumstances dictate otherwise, the variance shall be honored by the commissioner without the necessity of following the formal requirements which would otherwise be applicable. In addition, the commissioner will not withdraw a citation for violation of a standard for which the Secretary of Labor has granted a variance unless the commissioner previously received notice of and decided to honor the variance; and

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5. Incomplete applications will be returned within 30 days to the applicant with a statement indicating the reason or reasons that the application was found to be incomplete.
- B. In addition to the information specified in 16 VAC 25-60-200 A and 16 VAC 25-60-210 A of this regulation, every variance application shall contain the following:
1. A statement that the applicant has informed affected employees of the application by delivering a copy of the application to their authorized representative, if there is one, as well as having posted, in accordance with 16 VAC 25-60-40, a summary of the application which indicates where a full copy of the application may be examined.
 2. A statement indicating that the applicant has posted, with the summary of the application described above, the following notice: "Affected employees or their representatives have the right to petition the Commissioner of Labor and Industry for an opportunity to present their views, data, or arguments on the requested variance, or they may submit their comments to the commissioner in writing. Petitions for a hearing or written comments should be addressed to the Commissioner of Labor and Industry, Powers-Taylor Building, 13 South Thirteenth Street, Richmond, VA 23219. Such petitions will be accepted if they are received within 30 days from the posting of this notice or within 30 days from the date of publication of the commissioner's notice that public comments concerning this matter will be accepted, whichever is later."

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3. A statement indicating whether an application for a variance from the same standard or rule has been made to any federal agency or to an agency of another state. If such an application has been made, the name and address of each agency contacted shall be included.
- C. Upon receipt of a complete application for a variance, the commissioner shall publish a notice of the request in a newspaper of statewide circulation within 30 days after receipt, advising that public comments will be accepted for 30 days and that an informal hearing may be requested in conformance with subsection D of this section. Further, the commissioner may initiate an inspection of the establishment in regard to the variance request.
- D. If within 30 days of the publication of notice the commissioner receives a request to be heard on the variance from the employer, affected employees, the employee representative, or other employers affected by the same standard or regulation, the commissioner will schedule a hearing with the party or parties wishing to be heard and the employer requesting the variance. The commissioner may also schedule a hearing upon his own motion. The hearing will be held within a reasonable time and will be conducted informally in accordance with ~~§ 9-6.14:11~~ §§ 2.2-4019 and 2.2-4021 of the *Code of Virginia* unless the commissioner finds that there is a substantial reason to proceed under the formal provisions of ~~§ 9-6.14:12~~ 2.2-4020 of the *Code of Virginia*.
- E. If the commissioner has not been petitioned for a hearing on the variance application, a decision on the application may be made promptly after the close of the period for public

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comments. This decision will be based upon the information contained in the application, the report of any variance inspection made concerning the application, any other pertinent staff reports, federal OSHA comments or public records, and any written data and views submitted by employees, employee representatives, other employers, or the public.

- F. The commissioner will grant a variance request only if it is found that the employer has met by a preponderance of the evidence, the requirements of either 16 VAC 25-60-200 B 4 or 16 VAC 25-60-210 B 4.
1. The commissioner shall advise the employer in writing of the decision and shall send a copy to the employee representative if applicable. If the variance is granted, a notice of the decision will be published in a newspaper of statewide circulation.
 2. The employer shall post a copy of the commissioner's decision in accordance with 16 VAC 25-60-40.
- G. Any party may within 15 days of the commissioner's decision file a notice of appeal to the board. Such appeal shall be in writing, addressed to the board, and include a statement of how other affected parties have been notified of the appeal. Upon notice of a proper appeal, the commissioner shall advise the board of the appeal and arrange a date for the board to consider the appeal. The commissioner shall advise the employer and employee representative of the time and place that the board will consider the appeal. Any party that submitted written or oral views or participated in the hearing concerning

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the original application for the variance shall be invited to attend the appeal hearing. If there is no employee representative, a copy of the commissioner's letter to the employer shall be posted by the employer in accordance with the requirements of 16 VAC 25-60-40.

- H. The Board shall sustain, reverse, or modify the commissioner's decision based upon consideration of the evidence in the record upon which the commissioner's decision was made and the views and arguments presented as provided above. The burden shall be on the party filing the appeal to designate and demonstrate any error by the commissioner which would justify reversal or modification of the decision. The issues to be considered by the board shall be those issues that could be considered by a court reviewing agency action in accordance with ~~§ 9-6.14:17~~ 2.2-4027 of the *Code of Virginia*. All parties involved shall be advised of the board's decision within 10 working days after the hearing of the appeal.

16 VAC 25-60-290 Contest proceedings applicable to political subdivisions.

- A. Where the informal conference has failed to resolve any controversies arising from the citation, and a timely notice of contest has been received regarding a citation issued to a public employer other than the Commonwealth or one of its agencies, the Commissioner of Labor and Industry shall schedule a hearing in accordance with the provisions of ~~§ 9-6.14:11~~ §§ 2.2-4019 and 2.2-4021 of the *Code of Virginia*. Upon conclusion of the hearing, the commissioner will notify all participants within five working days of the decision to affirm, modify or vacate the contested aspects of the

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citation or abatement order.

- B. Public employers may appeal decisions of the commissioner in the manner provided for in §§ ~~9-6.14:15 through 9-6.14.19~~ 2.2-4025 through 2.2-4029 of the *Code of Virginia*.
- C. Public employees and their authorized representative have full rights to notification and participation in all hearings and appeals as are given private sector employees.
- D. If abatement of citations is not accomplished, the commissioner shall seek injunctive relief under § 40.1-49.4.F of the *Code of Virginia*.

16 VAC 25-60-320 Extension of abatement time.

- A. Where an extension of abatement is sought concerning a final order of the commissioner or of a court, the extension can be granted as an exercise of the enforcement discretion of the commissioner. While the extension is in effect the commissioner will not seek to cite the employer for failure to abate the violation in question. The employer shall carry the burden of proof to show that an extension should be granted.
- B. The commissioner will consider a written petition for an extension of abatement time if the petition is mailed to or received by the commissioner prior to the expiration of the established abatement time.
- C. A written petition requesting an extension of abatement time shall include the following information:
 - 1. All steps taken by the employer, and the dates such actions were taken, in an effort to achieve compliance during the prescribed abatement period;

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2. The specific additional abatement time necessary in order to achieve compliance;
 3. The reasons such additional time is necessary, such as the unavailability of professional or technical personnel or of materials and equipment, or because necessary construction or alteration of facilities cannot be completed by the original abatement date;
 4. All available interim steps being taken to safeguard the employees against the cited hazard during the abatement period; and
 5. A certification that a copy of the petition has been posted and served on the authorized representative of affected employees, if there is one, in accordance with 16 VAC 25-60-40, and a certification of the date upon which such posting and service was made.
- D. A written petition requesting an extension of abatement which is filed with the commissioner after expiration of the established abatement time will be accepted only if the petition contains an explanation satisfactory to the commissioner as to why the petition could not have been filed in a timely manner.
1. The employer is to notify the commissioner as soon as possible.
 2. Notification of the exceptional circumstances which prevents compliance within the original abatement period shall accompany a written petition which includes all information required in subsection C.
- E. The commissioner will not make a decision regarding such a petition until the expiration of 15 working days from the date the petition was posted or served.

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- F. Affected employees, or their representative, may file a written objection to a petition for extension of abatement time. Such objections must be received by the commissioner within 10 working days of the date of posting of the employer's petition. Failure to object within the specified time period shall constitute a waiver of any right to object to the request.
- G. When affected employees, or their representatives object to the petition, the commissioner will attempt to resolve the issue in accordance with 16 VAC 25-60-330 of this chapter. If the matter is not settled or settlement does not appear probable, the Commissioner of Labor and Industry will hear the objections in the manner set forth at subsection I below.
- H. The employer or an affected employee may seek review of an adverse decision regarding the petition for extension of abatement to the Commissioner of Labor and Industry within five working days after receipt of the commissioner's decision.
- I. An employee's objection not resolved under Subsection G of this section or an employer or employee appeal under Subsection H will be heard by the Commissioner of Labor and Industry using the procedures of ~~§ 9-6.14:11~~ §§ 2.2-4019 and 2.2-4021 of the *Code of Virginia*. Burden of proof for a hearing under subsection G shall lie with the employer. Burden of proof for an appeal under subsection H shall lie with the party seeking review.
1. All parties shall be advised of the time and place of the hearing by the commissioner.
 2. Within 15 working days of the hearing, all parties will be advised of the

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Commissioner of Labor and Industry's decision.

3. Since the issue is whether the Commissioner of Labor and Industry will exercise his enforcement discretion, no further appeal is available.